Supreme Court, U.S.
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No. 09-10-95

IN THE

Supreme Court of the United States

SAUNDRA J. COUNCE, R.N.,
Petitioner,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF MANDAMUS

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June 30, 2010

QUESTIONS PRESENTED

1. If it is the *law of this case* as held by the Merit Systems Protection Board (MSPB) at the successful urging of Respondent-Appellee VA, that Petitioner-Appellant had no MSPB appeal rights because, as MSPB stated she was "subject to the VA's Disciplinary Appeals Board [DAB] procedure" as the result of her "serving under a permanent appointment" and "therefore . . . DAB had 'exclusive jurisdiction' to review appellant's removal," should principles of respect for the integrity of administrative adjudication demand that Respondent-Appellee VA be ordered to provide Petitioner-Appellant DAB appeal rights because it is *the law of the case*, particularly because it was Respondent-Appellee that persuaded the MSPB to dismiss her MSPB appeal because Petitioner-Appellant had DAB hearing and due process rights?

2. Should the Federal District Court and/or the Sixth Circuit Court of Appeals have applied *judicial estoppel* and ordered VA to stop reversing its positions on Petitioner-Appellant's permanent or probationary employment status (VA made *two reversals*, its *first* was to deny Petitioner-Appellant her MSPB rights, the *second* reversal was after MSPB dismissed her claims and she appealed to VA and was in federal court), after VA was successful in having MSPB refuse to exercise its jurisdiction to provide Petitioner-Appellant any relief because MSPB ruled that Petitioner-Appellant had DAB rights so necessarily she was "VA Permanent," by ordering the parties bound by the MSPB's decision so that *judicial estoppel* and *law of the case* establish in Petitioner-Appellant's case that she has the rights of a non-probationary VA employee before the VA (and in federal court) so she can get the DAB due process hearing she needs to have her claims fairly adjudicated before the VA?

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TIMELINE

1. Petitioner hired under 38 U.S.C. 7405 (a) (1) (A) and began work *June 17, 2001.* (Appendix A and E, p. 5a and 25a.)

2. Probationary period for Respondent's registered nurses hired under Chapter 74 of Title 38 is 2 years (§ 7403 (b) (1) of Title 38) if performance is "satisfactory". (§ 7403 (b) (2).)

3. *April 21, 2002,* Petitioner was re-appointed under 38 U.S.C. 7401 (1), Respondent having "lost" her entry paperwork and then delayed processing it until April 2002. (Appendix A and E, p. 6a and 26a.)

4. *June 17, 2002,* received excellent end-of-first year Proficiency Report. (Appendix F, p. 28a-29a.)

5. About May 20th, 2003 Petitioner's nurse- supervisor prepared and gave her an excellent end-of-second-year Proficiency Report for Petitioner to review, sign, and return to supervisor. (Appendix F, p. 30a-31a.)

6. *May 30, 2003,* Petitioner signed her timely "good" 2nd anniversary Proficiency Report (Attachment F, p. 30a-31a), and returned the supervisor's copy, which "disappeared" and was later substituted for a "bad" Proficiency Report on *August 17, 2003.* (Appendix F, p. 32a-33a.)

7. *June 15, 2003,* Petitioner was designated "permanent" with "tenure" pursuant to 38 U.S.C. § 7403 by an official VA Notification of Personnel Action Standard FORM 50-B, issued to Petitioner at the completion of her probationary period of two-years. (Appendix E, p. 27a.)

8. *August 1, 2003*, Petitioner summoned to appear before Nurse Professional Standards Board, a summary review body that has jurisdiction only over nurses who have not completed the VA's two-year probation. (Appendix G, p. 36a-38a.)

9. When separating Petitioner, *after* she attained her § 7403 permanent appointment, Respondent asserted that her § 7404 (1) appointment status effective *April 21, 2002, re-started* her probationary period, extending it until *April 20, 2004*. (Appendix A, p. 2a, 9a.)

10. *August 21, 2003*, Petitioner was tried and found guilty of unprofessional conduct by a summary hearing procedure used only for "probationaries," despite Petitioner arguing that her due process and fair hearing rights as a permanent VA nurse were denied to her. (Appendix B, p. 11a-13a.)

11. *September 19, 2003*, *"Separation During Probationary Period"* letter, VA declaring unequivocally that Petitioner was probationary and had only the rights she had received from the summary review before the Nurse Professional Standards Board. (Appendix B, p. 11a-13a.)

12. During Petitioner's Appeal at Merit Systems Protection Board (MSPB), Respondent VA successfully argued that Petitioner was a ***permanent*** VA nurse who was entitled to VA's Disciplinary Appeals Board (DAB) procedures; they were her exclusive remedy; and consequently MSPD could not take jurisdiction. (Appendix A, p. 2a-3a, 9a, 17a-18a.)

13. When Petitioner applied to VA for her DAB due process and hearing rights, Respondent denied her any DAB fair hearing rights, for the reason she was "**probationary**," (Appendix D, p. 23a-

24a), the opposite of the necessary assumption Respondent used in successfully arguing for the MSPB to dismiss Petitioner's appeal for lack of jurisdiction. (Appendix C, p. 1a-10a, 17a-18.)

14. Petitioner litigated pro se in the District Court and in the Sixth Circuit Court of Appeals, but was unsuccessful in getting either court to acknowledge the issue of *judicial estoppel* against Respondent VA, or that the MSPB's ruling that she was a permanent VA nurse, is the *law of the case*.

IN THE
SUPREME COURT OF THE UNITED STATES

Saundra J. Counce, R.N., *Petitioner,*	)	
v.	)	ORDER
Secretary of the United States Department of Veterans Affairs, *Respondent.*	)	

By reason of Defendant-Appellee Veterans Administration's successful arguments to the United States Merit Systems Protection Board, Petitioner's claims were foreclosed from adjudication before that administrative body. Additionally, Defendant-Appellee's arguments and positions were the cause of the holding by the Merit Systems Protection Board, creating the law of this case, that Petitioner is entitled to the hearing and associated due process rights afforded by the Disciplinary Appeals Board procedures provided to Title 38 Veterans Administration employees who completed their probationary periods of employment and were permanent employees of the Veterans Administration.

For the above reasons the Sixth Circuit Court of Appeals is ORDERED to remand this case to Defendant-Appellee Veterans Administration who shall be Ordered to provide to Petitioner the rights that Defendant-Appellee provided to its registered nurses who were permanent employees as of September 2003, by reason of completing the probationary period of employment required by Section 7403(a)(2)(e) and Section 7403(b)(1) of Title 38 United States Code.

ENTERED BY ORDER OF THE SUPREME COURT OF THE UNITED STATES.

Signed: *Date*

IN THE

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No. 09-___

SAUNDRA J. COUNCE, R.N.,
Petitioner,

v.

SECRETARY OF THE UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Mandamus to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF MANDAMUS

JURISDICTION

A *mandamus* is an order to a public agency or governmental body to perform an act required by law when it has neglected or refused to do so.

The writ of mandamus will issue only in extraordinary circumstances. *See Sporck v. Peil*, 759 F.2d 312, 314 (3d Cir. 1985). As a precondition to the issuance of the writ, the petitioner must establish that there is no alternative remedy or other adequate means to obtain the desired relief, and the petitioner must demonstrate a clear and indisputable right to the relief sought. *Kerr v. United States District Court*,

426 U.S. 394, 403 (1976). A writ is not a substitute for an appeal; only if a direct appeal is unavailable will the court determine whether a writ of mandamus will issue. *See In Re Ford Motor Co.*, 110 F.3d 954, 957 (3d Cir. 1997). Petitioner-Appellant has exhausted available administrative and judicial tribunals to obtain the hearing before Respondent-Appellee's Disciplinary Appeals Board that she is entitled to. Petition for Writ of Mandamus appears to be the remedy that will best conserve judicial time and resources, meeting the criteria of Supreme Court Rule 20. (28 U.S.C. § 1651 (a)).

AN ORDER BY WRIT OF MANDAMUS CAN ISSUE

On the unique facts of this case where Respondent-Appellee (Respondent) U.S. Veterans Administration (VA) successfully argued and established at the Merit Systems Protection Board (MSPB) that Petitioner-Appellant (Petitioner) has the right to a hearing before VA's Disciplinary Appeals Board (DAB), and as the relief before this Court Petitioner is seeking only her DAB hearing at the VA that Respondent VA has continually denied to her contrary to principles of *judicial estoppel* and *law of the case*, an Order per Writ of Mandamus can properly issue from this Court to require Respondent VA to provide to Petitioner her VA administrative due process and hearing rights that Respondent VA successful argued to MSPB the Petitioner is entitled to as a matter of law.

SUMMARY FACTS AND PROCEEDINGS

Petitioner Saundra J. Counce, a registered nurse with no prior U.S. Government service (Petitioner), was hired by VA on June 17, 2001. The next day she

took the oath of office and began work as a "full-time temporary" under § 7405(a)(1)(A) of Chapter 74 of 38 U.S.C. (Appendix A and E, p. 5a and 25a.) Chapter 74 of Title 38 grants VA special authority to hire and pay nurses and other medical professionals without regard to the Civil Service laws in Title 5.[1] The probationary period for VA nurses, physicians and similar medical professionals is two years (38 U.S.C. § 7403(b)(1)[2]. Probation starts on the employee's "anniversary date,"[3] more technically called "Service

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[1] § 7405. Temporary full-time appointments, part-time appointments, and without-compensation appointments.

(a) The Secretary, upon the recommendation of the Under Secretary for Health, may employ, *without regard to civil service or classification laws, rules, or regulations*, personnel as follows:

(1) On a *temporary full-time* basis, part-time basis, or without compensation basis, persons in the following positions:

(A) Positions listed in section 7401 (1) of this title. (including *registered nurses*) (Emphasis added.)

[2] "Appointments described in subsection (a) [*e.g.*, physicians, nurses, physician assistants hired under Chapter 74] shall be for a probationary period of two years." Further, VA Handbook 5005, April 15, 2002, provides, in Part II, Chapter 3, b. *Length of Probationary Period*: "The probationary period for employees appointed on or after December 20, 1979, is 2 years. In addition, para. c. *Last Day of Probationary Period*, provides, in subpara. (2), that "For employees paid on an hourly basis (nurses, nurse anesthetists . . . . the probationary period is completed at the end of the last scheduled duty before the employee's **anniversary date** . . . (Emphasis added).

[3] VA HANDBOOK 5005/7 APRIL 15, 2002 PART II CHAPTER 3

SECTION F. APPOINTMENTS UNDER 38 U.S.C. 7401.

Computation Date" (SCD) or anniversary date. A VA employee's SCD appears in Block 31 of STANDARD FORM 50-B, NOTIFICATION OF PERSONNEL ACTION. (*See* Appendix E, p. 27a, block 31.) A VA employee's probationary period keeps running in her favor, so long as her performance at VA is not written up as "unsatisfactory." (*See* § 7403(b)(2).)

On April 21, 2002, after 10 months of satisfactory work, Petitioner was converted from "temporary full-time" to "permanent" VA nurse status under § 7401(1) of Chapter 74, 38 U.S.C. The Standard Form 50-B recited in "Remarks" that her conversion appointment was "Subject to completion of 2 year probationary period commencing 04-21-2002." (Appendix A and E, p. 6a and 26a.) Petitioner, who at that time knew very little about VA's personnel system, assumed VA had authority to extend her probationary period for an extra 10 months and therefore expected to be probationary through April 20, 2004.[4] Petitioner was surprised when she re-

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3. PROBATIONARY PERIOD FOR 38 U.S.C. 7401(1) APPOINTEES

b. Length of Probationary Period.

c. Last Day of Probationary Period.

(2) For employees paid on an hourly basis (nurses, nurse anesthetists, PAs (physician assistants), and EFDAs (expanded-function dental auxiliaries)()), *the probationary period is completed at the end of the last scheduled duty before the* ***employee's anniversary date***. (Emphasis added).

[4] VA and Office of Personnel Management regulations appear to be to the contrary. (*See* VA Handbook 5005/7 (fn. 3); 5 CFR 315.704 (a) (1) and (2) (temporary employment counts toward a probationary period); 5 CFR 315.802 (a) ("The probationary period required by § 315.801 is 1 year and may not be extended.").

ceived her Proficiency Report in mid-June 2002 (VA FORM 10-2623).[5] VA had entered her SCD as "6-17-01." (Appendix F, p. 28a.) From that entry it appeared her probationary period was half over. She could expect to be "permanent"—tenured—by June 2003, not April 2004, as the April 21, 2002 conversion Form 50-B recited. (Appendix A and E, p. 6a and 26a, section 45. REMARKS, lines 2-3).

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5 CFR § 315.704 Conversion to career employment from indefinite or temporary employment.

(a) *General.* Employees serving after February 7, 1968, in competitive positions under indefinite appointments or temporary appointments pending establishment of a register or as status quo employees acquire competitive status and *are entitled to have their employment converted to career employment when such employees*:

(2) Have rendered satisfactory service for the 12 months immediately preceding the conversion; and . . . . (Emphasis added) (a) The first year of service of an employee who is given a career or career-conditional appointment under this part is a probationary period . . . (Emphasis added).

5 CFR § 315.802 Length of probationary period; crediting service.

(a) The probationary period required by §315.801 is *1 year and may not be extended.* (Emphasis added.)

[5] Petitioner was rated "Satisfactory" in her June 2002 Proficiency Report. Her supervisor, Linda Wyatt, RN, commented favorably on her professional performance:

> *"Mrs. Counce is self-directed in organizing and providing skilled nursing assessments and care to patients with multivariate nursing diagnoses and psychological needs . . ."*
>
> *"Mrs. Counce has been a role model and is one of the preceptors for nurses who are new to 2 North. She is supportive of her colleagues, and encouraging of new staff. I have received several compliments regarding her tact and patience in precepting new nurses. . ."* (Appendix F, p. 28a.)

The end of May 2003, Petitioner's immediate supervisor, Linda Wyatt, RN., gave Petitioner her second annual Proficiency Report, plus a copy for her files. Wyatt asked Petitioner to review, sign, and return the Proficiency Report, keeping the copy for her personal records. Again, VA's SCD entry on that employee rating document, VA FORM 10-2623, was "6-17-01."[6] (Appendix F, p. 30a-31a.) On May 30, 2002, Petitioner signed one copy of her Proficiency Report and placed it in her supervisor's office when Wyatt was away from her desk. (Counce Affidavit: DE#21 Part 2 Appendix C.) Petitioner kept the unsigned duplicate. (*See* Appendix F, p. 30a-31a.)

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[6] Petitioner's supervisor rated her "Satisfactory" at the end of her second year, and once again made favorable comments:

> Practice: "*Mrs. Counce is an experienced nurse who continues to bring a high level of care and compassion with her to 2 North. She is respected by new nursing staff, veteran nursing staff, her patients and their families. . . . I have personally received favorable comments about Mrs. Counce from staff and from patients and their families. . . .*"
>
> Performance: "*Mrs. Counce actively self-appraises her own nursing skills, and is willing to attend educational offerings on her free time . . .*"
>
> Collegiality: "*Mrs. Counce also appraises and monitors the nursing skills and quality of care provided by other nurses on 2 North, and shares her observations with the Nurse Manager. She has been very supportive of the new nursing orientees on 2 North. Mrs. Counce also serves as a role model and resource to the nursing joint 2 North staff.*"
>
> Collaboration: "*A recent new nurse orienting to 2 North had a very difficult time in acquiring the nursing skills and self-confidence to feel secure on 2 North. Mrs. Counce heard of the problems, and asked that the new nurse be placed on her weekend rotation so that she could assist this new staff member in orienting to 2 North, at a more comfortable pace, so that we have retained this valued new nurse.*"

Petitioner never again saw the end-of-second year Proficiency Report she signed and placed in her supervisor's office on May 30, 2003.[7] Despite Petitioner's repeated requests and motions, Respondent-Appellee VA did not produce in discovery the "lost" 2002-2003 Proficiency Report Petitioner signed and turned in on May 30, 2003.

VA's next personnel action was on June 13, 2003. Petitioner was given a permanent appointment under § 7403 of Chapter 74 of 38 U.S.C. (Appendix E, p. 27a.) Effective June 15, 2003, Petitioner was classified as "permanent" per Block 24 of FORM 50-B, "Tenure." For the second time, the Block 31, SCD entry was "06-17-01.[8] This Standard Form 50-B had no qualifying remarks like the Form 50-B Petitioner received on April 21, 2002. That NOTIFICATION OF PERSONNEL ACTION stated that Petitioner

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[7] Affidavits in the record by both the union president and union steward, B.R. Hardison and Nelda Rouse, RN, affirm that on May 30, 2003, they saw and discussed the Proficiency Report that Petitioner's supervisor gave her about 10 days before, rating her second performance year (retained, unsigned copy at Appendix F, p. 30a-31a). When President Hardison saw that evaluation he exclaimed: "Sign that sucker, and get it in!" (Hardison Affidavit, p. 1, ¶ 2 (DE21Part4Page30Para2Line4), Rouse Affidavit, ¶ 13-15 (DE21Part5Page5-8.)

[8] Section 7403 (a) (1) provides:

> Appointments under this chapter of health-care professionals to whom this section applies may be made only after qualifications have been satisfactorily established in accordance with regulations prescribed by the Secretary, without regard to civil-service requirements.

Subsection (a) (2) states:

> This section applies to the following persons appointed under this chapter:
>
> . . . (E) Nurses.

was to stay on probation for two years starting April 21, 2002. (Agency's Appendix B to MSPB submission to Judge Clancy, also at Appendix E, p. 27a.)

August 1, 2003, Petitioner was given notice that her professional performance would be reviewed by a Nurse Professional Standards Board (NPSB) to be convened August 21, 2003. (Appendix G, p. 36a-38a.) The purpose of the NPSB was:

> 1 ". . . to conduct a summary review of your performance and conduct *during your probationary period* and make a recommendation concerning your retention in or separation from the Veteran's Health Administration. This review is being held pursuant to 38 U.S.C. (United States Code) section 7403 (b),[9] and will be based upon available records and information furnished by you and others who may be called by the NPSB."
>
> 2. "The NPSB is to review the following alleged *deficiencies in your performance and conduct:*"
>
> *"Falsification of medical records related to medication administration, insubordination (failure to report to duty, not training, as directed by the Nurse Manager), and failure to follow acceptable*

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[9] Section 7403 (b) provides:

> (1) Appointments described in subsection (a) shall be for a *probationary period of two years.* (Emphasis added.)
>
> (2) The record of each person serving under such an appointment in the Medical, Dental, and Nursing Services shall be reviewed from time to time by a board, appointed in accordance with regulations of the Secretary. If such a board finds that such person is not fully qualified and satisfactory, such person shall be separated from the service.

> *nursing standards of care and practice related to patient care.*" (Appendix G) (Emphasis added.)

VA's August 1st notice warned Petitioner that (because VA asserted she was still "probationary," *see* para. 1, next above) she did not have the right to full assistance of a representative or legal counsel during the hearing, or the right to examine third parties' evidence presented at the NPSB. Despite her inability to cross-examine witness testimony or to question evidence that could include damaging hearsay, such unexamined materials could be used by the NPSB to pass judgment on her performance as a nurse. The August 1st letter cautioned Petitioner about the summary nature of NPSB proceedings:

> "This is not an adversarial proceeding, so your representative's role will be limited to assisting you in exercising your right to respond orally and/or in writing to the reasons for the review."[10]

August 17, 2003, Petitioner was handed a different 2002-2003 second year Proficiency Report (VA FORM 10-2623), than the "Satisfactory" Proficiency Report she was given, had signed, and placed in her supervisor's office the prior May 30th. This substituted Proficiency Report was prepared by her same supervisor, Linda Wyatt, RN; but this time Wyatt rated Petitioner "Low Satisfactory" for the same year, "From 6-17-02 To 6-17-03". (Appendix F, p. 32a-33a.)

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[10] During the NPSB's review Petitioner's representative was not allowed to speak or ask questions even when Petitioner was testifying or being questioned; Petitioner was excluded from the hearing except when she was testifying; and no transcript was made of the proceedings. The record consists of copies of occasional handwritten notes and individual observations made by those who sat as the NPSB.

Petitioner was surprised. Counting the 2002-2003 Proficiency Report Nurse-Supervisor Wyatt gave her on May 20th that Petitioner reviewed, signed and turned in, Wyatt had rated Petitioner's professional performance "Satisfactory" for two years running. (Appendix F, p. 28a-31a.)[11] Petitioner did not sign the August 17, 2003 substituted Proficiency Report. (Appendix F, p. 29a-31a.)

Despite VA having noticed Petitioner to appear before an NPSB, a summary review board[12] with

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[11] In addition to substituting "*Low Satisfactory*" for "*Satisfactory*," Supervisor Wyatt's comments were 180 degrees (*Valentine-Johnson*, 386 F.3d at 810) from her comments on Petitioner's annual Proficiency Reports that Wyatt gave her for the prior two years. (Appendix F, p. 32a-35a.)

Under "*Practice*," *e.g.*, Wyatt stated:

> "*Mrs. Counce has difficulty in managing and delivering care in an efficient and timely manner.*"

For "*Performance*," Wyatt observed:

> "*Mrs. Counce has a chronic problem with organization and prioritization of care, and usually stays over after the shift is over to complete her documentation.*"

Under "*Collegiality*," Nurse-Supervisor Wyatt wrote:

> "*Mrs. Counce is very willing to critique the nursing care of her fellow nurses, but does not scrutinize her own nursing practice as carefully.*"

Wyatt commented on Petitioner's "*Collaboration:*"

> "*Mrs. Counce consults the team physicians when necessary, but has not developed sound interpersonal skills to deal with other health care providers. . . .*" (Emphasis added).

[12] VA HANDBOOK 5005/17 APRIL 15, 2002 PART II

CHAPTER 3 SECTION C. PROFESSIONAL STANDARDS BOARDS

jurisdiction limited to nurses who have not completed their probationary service,[13] VA's SCD entry in Block 11 of that "new" Proficiency Report—her anniversary date was for the fourth time—6-17-01." (*see* fn. 14) (Appendix F, p. 32a-33a.) On its face, that entry certified that by August 17, 2003, Petitioner had completed 26 months of creditable service and

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1. ESTABLISHMENT a. Professional Standards Boards for occupations listed in 38 U.S.C. 7401(1) act for, are responsible to, and are agencies of the Under Secretary for Health in matters concerning appointments, advancements, and probationary reviews of physicians, dentists, podiatrists, optometrists, chiropractors, nurses [RNs], ... *Boards will determine eligibility and recommend the appropriate grade for appointments under authority of 38 U.S.C. 7401(1) and 7405(a)(1) ((A))*; recommend candidates for advancements; [ ] and *conduct probationary reviews.*

[13] VA HANDBOOK 5021 APRIL 15, 2002 PART III CHAPTER 1.

PROBATIONARY PERIOD ACTIONS

TITLE 38 PROBATIONARY EMPLOYEES

1. SCOPE. This chapter contains the policy and procedures needed for taking actions against title 38 employees *serving on a probationary period* under 38 United States Code (U.S.C.) 7403(b) in the Department of Veterans Affairs (VA). *This includes employees appointed under 38 U.S.C. 7401(1)*, i.e., *nurses* (Emphasis added.)

VA's HANDBOOK 5021 also makes it abundantly clear, when delineating the hearing rights of medical professionals like registered nurses who, like Petitioner, are appointed under § 7401 (1), that such 7401 (1) appointees do not have any rights to VA's due process and fair adjudicative procedures at the DAB (including the right to be represented by counsel at all times) (CHAPTER I, PART II, 1. SCOPE, **unless and until, such § 7401 (1) nurse appointees like Petitioner ". . . *have satisfactorily completed the probationary period required by 38 U.S.C. 7403 (b).*** (at fn. 15: 1. SCOPE, a. (1)). (Emphasis added.)

therefore she had been a permanent VA nurse for 2 months.

The day of her NPSB hearing, August 21, 2003, Petitioner was handed another copy of VA's substituted 2002-2003 Proficiency Report. Petitioner's supervisors ordered her to review that Proficiency Report and sign it, to record that she received it. She refused to sign. Her supervisor, Linda Wyatt, RN, noted in Block 19a, 'Signature of Employee: "Ms. Counce refused to sign proficiency. LW (Linda Wyatt) 8-21-03." (Appendix F p. 34a-35a.)

That substituted second annual Proficiency Report evaluating Petitioner for her professional performance June 2002 through June 2003, also had Petitioner's SCD entry as "6-17-01."[14] (Appendix F, p. 7.)

Petitioner was terminated by action of the NPSB, despite her objections to denial of the due process she was entitled to as a VA nurse who had completed her two years of probationary service. As a permanent VA nurse, for "charges based on conduct or performance" (38 U.S.C. § 7461 (a)) such as Petitioner was facing, she had the due process hearing rights provided before VA's Disciplinary Appeals Board (DAB) (§ 7461 (b) (1),[15] including the right,

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[14] Counting the Standard FORM 50-B effective June 15, 2003 that appointed Petitioner a permanent VA nurse under § 7403 of Chapter 74, 38 U.S.C. (Appendix E, p. 27a), by August 21, 2003, VA had officially notified Petitioner in five documents (Appendix F, p. 28a, 30a, 32a, 34a, Block 11: SERVICE COMPUTATION DATE, and Appendix E, p. 27a, Block 24, TENURE: 1—PERMANENT).

[15] VA HANDBOOK 5021 APRIL 15, 2002 CHAPTER I.

PART II. DISCIPLINARY PROCEDURES UNDER TITLE 38, DISCIPLINARY AND MAJOR ADVERSE ACTIONS

> . . . ***to be represented by an attorney or other representative of the employee's choice at all stages of the case.*** (38 U.S.C. § 7462 (b) (2)). (Emphasis added.)

Instead, VA ordered Petitioner tried by an NPSB (Appendix G, p. 36a-38a) - August 1, 2003 Notice of the NPSB hearing), a summary review board with jurisdiction limited to probationary VA employees who had not completed a two year probationary period. (38 U.S.C. § 7403 (b) (1)).[16]

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1. SCOPE

a. This part governs disciplinary and major adverse actions based on conduct or performance in the Department of Veterans Affairs (VA).

(1) The provisions of this chapter apply to VA employees holding a full-time, permanent appointment under 38 United States Code (U.S.C.) 7401(1) who have satisfactorily completed the probationary period required by 38 U.S.C. 7403(b). Included are: . . . . (Emphasis added.)

(e) Nurses . . . .

3. POLICY . . . .

c. Employees are entitled to be represented by an attorney or other representative of the employee's choice at all stages of the case.

d. Actions covered under this part are subject to the prohibited personnel practices listed in 5 U.S.C. 2302, prohibiting:

(1) Discrimination because of race, color, religion, sex, national origin, age, disabling condition, marital status, or partisan political reasons; and

(2) Reprisal for the proper exercise of an employee's legal or administrative rights.

[16] VA HANDBOOK 5021 APRIL 15, 2002 CHAPTER I.

PART III. PROBATIONARY PERIOD ACTIONS

CHAPTER I. TITLE 38 PROBATIONARY EMPLOYEES

In spite of VA's repeated official personnel actions that by mid-June 2003 appeared to make Petitioner

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1. SCOPE. This chapter contains the policy and procedures needed for taking actions against title 38 employees serving *on* (sic) *a probationary period* under 38 United States Code (U.S.C.) 7403 (b) in the Department of Veterans Affairs (VA). This includes employees appointed under 38 U.S.C. 7401 (1), i.e., physicians, dentists, nurses. . . .

f. PROFESSIONAL STANDARDS BOARDS. Professional Standards Boards will review the work records of each employee serving a probationary period in accordance with the provisions of this chapter. . . .

3. SUMMARY BOARD REVIEWS

d. Employee Rights. Employees subject to summary Board review have the right to: . . .

(5) Be represented by an individual of the employee's choice . . . . A summary review is not an adversarial procedure. The representative's role is limited to assisting the employee in exercising the right to reply orally and/or in writing to the reasons for the review. . .

f. Conduct of Board Review . . . .

(5) A verbatim recording of the review will not be made unless the Chairperson deems it necessary. . . .

(6) The Chief, Human Resources, or designee, will serve as a technical adviser to the Board. . . .

(7) To obtain essential facts, the Chairperson may call persons before the Board to answer questions that may assist the Board in its review. This includes persons who are believed to possess pertinent information about the employee or the circumstances which led to the review. . . .

(9) Only Board members are entitled to be present when an individual is being interviewed, except that an employee's representative may be present when the employee is being interviewed, *Employees or others who may be called upon to furnish information will not be subject to cross-examination, and the Chairperson of the Board will ensure that this does not occur.* (Emphasis added)

"VA permanent" (*see* fn. 14), the September 19, 2003 termination letter is captioned: "Saundra Counce, RN-Separation During Probationary Period." Reasons alleged for her termination included Petitioner's "*failure to follow acceptable nursing standards of care and practice related to patient care.*" (Appendix B, p. 11a-13a.)

Petitioner's case proceeded to the Merit Systems Protection Board. MSPB had jurisdiction to hear her claims involving professional conduct and competence if she was a probationary VA employee (38 U.S.C. § 7403 (f)(3), but not if she was a permanent VA employee. (38 U.S.C. § 7461 (a), (b)(1), and (c)(1); § 7462 (a) (1) (A) (B). If permanent, 38 U.S.C. § 7462—titled "Major adverse actions involving professional conduct or competence," granted exclusive jurisdiction to VA's DAB:

> (a)(1) Disciplinary Appeals Boards appointed under section 7464 of this title shall have *exclusive jurisdiction to* review any case—
>
> (A) which arises out of (or which includes) a *question of professional conduct or competence* of a section 7401 (1) employee; and
>
> (B) in which a major adverse action was taken. (Emphasis added).

VA reversed position at the MSPB, successfully arguing that MSPB lacked jurisdiction because Petitioner "was a permanent employee" (Appendix A, p. 2a, ¶ 3) and consequently she had the 38 U.S.C. § 7462 hearing rights of a permanent VA employee (38 U.S.C. §§ 7461 through 7464) before the VA's Disciplinary Appeals Board (DAB). Although VA noted that in its view Petitioner had not yet satisfied

its probationary period requirements,[17] Respondent-Appellee VA expressly represented to the MSPB that because it had appointed her under 38 U.S.C. § 7401 (1), "Appellant was a permanent employee. . . ." (Appendix A, p. 2a) VA's MEMORANDUM IN SUPPORT OF MOTION FOR DISMISSAL FOR LACK OF JURISDICTION asserted:

> She is therefore subject to the exclusive remedy for major adverse actions, that is, an appeal to the VA Undersecretary for Health for the empanelment of a Disciplinary Appeals board. She has not made such an appeal. MSPB is without jurisdiction to hear this appeal of a major adverse action by a 38 U.S.C. 7401 (1) employee."[18] (Appendix A, p. 2a-3a, ¶ 3.)

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[17] As indicated throughout, the only way the VA's DAB can have "exclusive jurisdiction" over Petitioner's appeal, as Respondent VA successfully argued to the MSPB, is if she was a permanent VA nurse. Respondent could have presented the June 15, 2003 FORM 50-B to establish more easily to MSPB that Petitioner was a permanent employee so that DAB, not MSPB, had jurisdiction over her appeal. But that would have locked Respondent VA into the stance that Petitioner was "permanent." From Respondent's arguments and flip flops as to whether Petitioner was "*fish or fowl*," it appears that when Respondent argued to MSPB that Petitioner was permanent and had DAB hearing rights, it intended to reverse that position as soon as MSPB denied jurisdiction over Petitioner's appeal, as it did on May 3, 2004 and thereafter in federal court when Petitioner attempted to "*collect*" on her loss at MSPB by requesting her DAB hearing at VA.

[18] Petitioner points out that Respondent did not include in its submissions to MSPB, nor make any mention of VA's June 15, 2003 FORM 50-B that made Petitioner a VA permanent nurse pursuant to §7403 (Appendix E p. 27a), although VA has not denied it was issued. Unlike the April 21, 2002 appointment citing §7401 (1), the June 15, 2003 appointment pursuant to

Further on, VA's MEMORANDUM IN SUPPORT OF MOTION FOR DISMISSAL represented to the MSPB:

> *. . . [S]he is subject to Disciplinary Appeals Board procedure. Since a discharge is expressly defined in 38 U.S.C. 7461 (c) (2) (E) as a major adverse action, Appellant should have filed an appeal with the Disciplinary Appeals Board. She did not do so. Appellant had Title 38 remedies . . . .*" (Appendix A, p. 2a-3a.) (Emphasis added).

MSPB's administrative judge accepted Respondent-Appellee's representations that Petitioner had DAB hearing rights at the VA; that the DAB had "exclusive jurisdiction" over Petitioner's claims:

> *. . . [It] appears that appellant's removal was a major adverse action involving professional conduct as contemplated under 38 U.S.C. "§ 7462, and such an action is not reviewable by the Board . . . . Appellant alleged that she was not subject to this exclusive internal review process because she was not a permanent employee. . . .* ***The agency claimed, however, that she was subject to the Disciplinary Appeals Board (DAB) procedure.*** *(Appeal File, Tab 6). Indeed, while appellant may have been subject to completion of a probationary period, she was serving under a permanent appointment to a position listed at 38 U.S.C. § 7401 (1). Id. It therefore appears that*

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§ 7403 was unconditional. (Appendix E, p. 27a, compare the "Remarks" section with the April 21, 2002 FORM 50-B.) There was no recitation on the June 15, 2003 FORM 50-B, as there was on the April 21, 2002 FORM 50-B, that Petitioner was required to serve any probationary time beyond the two years from her SCD or anniversary date, June 17, 2001, as provided by § 7403 (b) (1).

the DAB had "exclusive jurisdiction" to review appellant's removal . . . ."

"In light of the foregoing, I find that appellant has not been subjected to a matter appealable to the Board, and that the Board lacks jurisdiction over the appeal. . . . It is therefore appropriate that the appeal be dismissed for lack of jurisdiction." (Appendix A, p. 17a-18a.) (Emphasis added.)

Yet when Petitioner appealed to VA for the DAB hearing with full due process that VA represented to the MSPB she was entitled to—a proper administrative hearing Petitioner knew she needed to properly present her claims against VA—VA changed position for the second time and denied her request for a DAB due process hearing. For DAB rights' purposes, Respondent-Appellee VA once again insisted Petitioner remained "probationary." According to VA, Petitioner had no DAB hearing rights, opposite to the position Respondent took at MSPB when it needed to have her appeal dismissed.

That surprise was in VA's response letter to Petitioner-Appellant of May 3, 2004:

Disciplinary Appeals Boards appointed under 38 U.S.C. 7464 have exclusive jurisdiction to review major adverse actions, which arise out of, or include, a question of professional conduct or competence of section 7401(1) employees who have successfully completed their probation period. Employees appointed under Section 7401(1) serve a two (2) year probationary period. You were appointed under 38 U.S.C. 7401(1) on April 21, 2002. Your two-year probation period commenced on this date. [See Appendix E, p. 26a, the April

> *21, 2002 FORM-50-B]* ***Prior service in a temporary appointment under Section 7405(A)(1) does not count towards completion of the probation period. Therefore, you had not successfully completed your probation period at the time of your discharge on October 3, 2003. Therefore, you are not entitled to appeal your discharge to a VA Disciplinary Appeals Board.*** (Appendix D)[19] (Emphasis added.)

The following December 23, 2004, the full MSPB affirmed the administrative judge's dismissal (Appendix C, p. 19a-21a), based on the VA's Motion to the MSPB. The Federal Circuit dismissed Petitioner's appeal. (Appendix C, p. 22a.)

In District Court and before the Sixth Circuit Court of Appeals, VA switched back to its original position as to Petitioner's status. Respondent contended that Petitioner's summary hearing at the NPSB afforded her all the rights she was entitled to at VA—there was no DAB jurisdiction over her claims—for the reason she never satisfied the two year probationary period VA required per the NOTIFICATION OF PERSONNEL ACTION FORM 50-B dated April 21, 2002 (Appendix A and E, p. 6a and 26a.)[20]

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[19] Again VA ignored, as Respondent-Appellee has throughout these proceedings, the NOTIFICATION OF PERSONNEL ACTION, FORM 50-B (Appendix E, p. 27a), that VA officially issued on June 15, 2003. That VA Notification of Personnel Action made Petitioner a permanent VA nurse pursuant to 38 U.S.C. § 7403. The June 15, 2003 FORM 50-B was issued without any qualification that she had to perform additional service in order to become "permanent." (*see* fn. 18).

[20] Petitioner has searched the VA's personnel manuals and so far has not been able to find any official VA regulation that allowed VA officials to extend Petitioner's statutory two-year

In a summary opinion issued November 22, 2009, the Sixth Circuit affirmed the District Court's grant of summary judgment. The opinion did not mention Petitioner's arguments or the MSPB holdings called to the Court's attention, concerning the preclusive effects of the MSPB's holdings that Petitioner had DAB hearing rights. Nor did the Sixth Circuit discuss Respondent's contradictory positions that should have estopped it from taking opposing legal positions for pure convenience. (Appendix I, p. 45a-47a.)

Petitioner filed a Motion to Clarify the first opinion by the Sixth Circuit, treated by that Court also as a petition for rehearing. (Appendix I, p. 48a-49a.)

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probationary period (§ 7403 (b) (1)) beyond June 16, 2003. Unless the probationary employee's work performance is sub-standard and those lapses are documented, employees such as Petitioner who are hired as "full-time temporary" (§ 7405 (a) (1) (A)) employees, receive probationary-time credit for such service. (*Khan v. West*, No 00-2450, 4th Cir. 2001,Unpublished, Per Curiam, Wilkinson, C.J., Motz, J., and Duffy, J., District Ct. Judge, [VA ordered to credit physician for his temporary full-time (§ 7405) service upon his conversion to VA permanent under § 7401 because § 7403 fixes probationary period at 2 years for all employees appointed under Chapter 74 of Title 38, which includes § 7405, 7401, and 7403 appointments (at p. 3-4, Appendix H, p. 39a-44a). Petitioner received a "Satisfactory" Proficiency Report for the period June 2001 through June 2002, including a number of favorable comments by her supervisor, Linda Wyatt, RN (Appendix F, p. 28a-31a) for the period—which included June 2001 through April 21, 2002—the time Petitioner worked as a full-time temporary under her § 7405 (a) (1) (A) appointment. That Proficiency Report contained all positives and no negatives. (Appendix F, p. 28a-29a, *see* fn. 5). For purposes of this Petition For Writ of Mandamus urging application of *law of the case*, it does not matter if the MSPB was right or wrong. Its holdings are the law of this case: Petitioner-Appellant does have DAB rights at the VA.

After Petitioner-Appellant filed her Motion to Clarify the Sixth Circuit's first opinion because that Court had not responded to her contentions, including that VA's NPSB had no jurisdiction to hear and determine the charges against her because by then she was "VA permanent" as held by the MSPB (*see* fn. 17), the 6th Circuit expressly affirmed the lower court's ruling that Petitioner-Appellant remained a probationary. (Appendix I, p. 45a-47a.) Despite Petitioner arguing to the Court of Appeals and presenting copy of the MSPB's holding that Petitioner was necessarily a "VA Permanent" because the VA's DAB had "exclusive jurisdiction" over her claims (*see* Pro se Plaintiff-Appellant's Dual Motion to Extend Time and Motion to Clarify, Dec. 23, 2009, p. 5, 15-17), the Court of Appeals did not mention the MSPB's holdings or Respondent-Appellee's opposite arguments made for pure convenience. The Court did respond to Petitioner's argument that VA's NPSB lacked jurisdiction:

> *In her motion, Counce [Petitioner] argues that the Nurse Professional Standards Board, which found that Counce falsified medical records and failed to follow acceptable nursing standards of care, lacked jurisdiction to review her employment performance. The record clearly indicates that Counce was still under a two-year probationary period, measured from her starting date as a permanent employee, when she was brought before the Nurse Professional Standards Board. Thus, she was subject to its jurisdiction. See 38 U.S.C. § 7403 (b) (1) and (2). (Appendix I, p. 2-3)*[21] (Appendix I, p. 49a.)

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[21] Petitioner is *not* seeking relief because the 6th Circuit was wrong on the law as to whether Petitioner-Appellant was

ARGUMENT

As a matter of law, since the point MSPB ruled Petitioner had DAB hearing rights because serving under a permanent appointment, it has been "the law of the case," that she has full due process hearing rights at the VA's DAB. As held in *University of Tennessee v. Elliott*, 478 U.S. 788, 798-799 and fn. 6 106 S.Ct. 3220, 3226 (1986), judgments rendered by administrative tribunals are binding on the parties in later stages of the same matter, where the tribunals have jurisdiction and the parties are accorded fair procedures (citing Davis, Administrative Law and Restatement of Judgments, § 83 (1982). More recently, in *State of New Hampshire v. State of Maine*, 532 U.S. 742, 747, 121 S.Ct. 1808 (2001). This Court unanimously ruled, in the context of a State-to-State settlement agreement one party was seeking to enforce, that:

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him (citations omitted).

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probationary or permanent. The issue is not whether the 6th Circuit was wrong or right on that point of law. The question is if on the facts of this case, where Respondent-Appellee took opposite positions as to Petitioner's due process hearing rights including right to assistance of counsel at a hearing on the charges against her, the doctrines of *law of the case* and *judicial estoppel* require Respondent-Appellee VA to provide to Petitioner-Appellant the Disciplinary Appeals Board hearing rights that Respondent-Appellee *successfully argued* to the MSPB that she had at the VA.

> This rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. (citing, along with cases, 18 Moore's Federal Practice 134. 30, p. 134-62 (3rd Ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding"), citing 18 C. Wright , Miller and Cooper, Federal Practice and Procedure 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.")).

In *New Hampshire v. Maine*, This Court stated the general conditions for application of judicial estoppel, including the perception that ". . . [w]ithin the first [here the VA] or the second court [MSPB] was misled." (532 U.S. at 747.) This Court further observed that because judicial estoppel is an equitable doctrine,

> . . . [W]e do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel. Additional considerations may inform the doctrine's application in specific factual contexts. (532 U.S. at 747.

In this case, the Circuit Court of Appeals did not speak to Petitioner's contentions that VA should have been estopped to assert she was probationary after having the MSPB dismiss her appeal based on VA's position that she had all the due process hearing rights of a permanent, non-probationary VA nurse. *Valentine-Johnson v. USAF*, 386 F.3d 800, 809-813 (2004) is a persuasive case of an Air Force civilian

employee the Air Force disadvantaged by switching positions as to her MSPB and related rights in federal court.[22]

Petitioner was born in 1949, to a mother who is 100% Mexican. She has mild but easily compensable reading dyslexia. When hired at VA, she had over 30 years of experience as a superior-rated nurse. She also had been married for over 30 (now 40) years and was principal caregiver to a Vietnam veteran, Donald A. Counce, who by then was severely disabled from Agent Orange exposure, brain trauma from mine explosions, and post-traumatic stress disorder (PTSD). Because of her experience and personally-acquired sensitivity to the special needs of the Veteran patients, she was expressly tasked by her supervisor to attempt to stop the bullying and related nurse-on-nurse violence that dulled nurses' empathy and caused them to neglect the Veterans they were charged to care for. (*See* Appendix F, p. 30a-35a.)

Petitioner has litigated Pro Se at all stages until the instant Petition, when Counsel of Record and Of Counsel are representing her Pro Bono. By the time Petitioner was terminated, her spouse was not able to work regularly and she was the sole support of her family of six that still included a child in school. Petitioner had no money or other resources to hire an

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[22] The similarities between Petitioner's case and *Valentine-Johnson* are unusually close, especially the unethical reversal of position that specially disadvantaged both pro se Petitioner, and pro se Plaintiff-Appellant Valentine-Johnson. The court held:

> In the interest of preventing the Air Force conduct from abusing the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment ... we conclude that judicial estoppel is applicable. (386 F.3d at 812.)

attorney; and no lawyer would take her case on contingency. As a nurse, who at that time was not at all familiar with legal process—and understandably baffled by VA's arcane personnel system and various official's contradictory interpretations of VA's personnel regulations—she was not able to successfully challenge VA's position that it had kept her as a "probationary" beyond the two year period established by 38 U.S.C. § 7403 (b)(1).[23]

Additionally, Respondent-Appellee VA should be estopped to deny her application for a DAB appeal, after VA conclusively asserted when she was targeted while still working at the VA, that she had no DAB rights; her exclusive remedy was through NPSB's summary procedures that had allowed her to be terminated based mostly on unchallenged, unexamined hearsay. (*See* Appendix G, p. 36a-38a and Appendix B, p. 11a-13a.) Further, VA's May 3, 2004 letter to Petitioner expressly rejected her application for a DAB appeal hearing (Appendix D, p. 23a-24a, the May 04 rejection letter) after the MSPB dismissed her claims because MSPB held she did have DAB rights. (Appendix C, p. 19a-21a.)

VA's successful arguments to MSPB, for example, were in conflict with the clear and simple words in VA Handbook 5021. Para. 1 states that for nurses and other medical staff appointed under the statutes within chapter 74 of Title 38 (*e.g.*, 7405 (A) (1), 7401 (1) and 7403, the three statutes under which Petitioner was appointed, converted and re-appointed or

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[23] The court's opinion in *Valentine-Johnson*, expressly weighed the factor that "she was" at critical times, proceeding pro se, and making her best effort to have all of her claims heard. (386 F.3d at 813.)

re-converted), nurses and other medical staff do not obtain DAB procedure rights until they have completed their two years of probation. (*See* fn. 13.) Because it was VA's official position, written on the April 21, 2002 NOTIFICATION OF PERSONNEL ACTION, FORM 50-B that Petitioner remained probationary until April 21, 2004 (Appendix A, p. 6a, Appendix E, p. 26a) in no way could VA have argued to the MSPB in good faith that Petitioner was "permanent" by Summer 2003 and consequently had any DAB due process and hearing rights.

VA was successful in its badfaith arguments, however, and the MSPB dismissed Petitioner's claims in that forum. Dismissal at the MSPB severely disadvantaged Petitioner, because MSPB was appropriate for litigating technical issues of federal personnel classification and law. VA successfully persuaded Administrative Judge Clancy (Appendix C, p. 15a-18a), and the full board of the MSPB (Appendix C, p. 19a-21a) (appeal dismissed by the Federal Circuit (Appendix C, p. 22a) to accept VA's representations, despite that Petitioner was, once again, denied the right to have her claims litigated properly. VA persuasively argued Petitioner had DAB rights (due process entitlements Petitioner had only if she had satisfied her 2 year probation period, which VA was adamant she had not, and could not have, until April 21, 2004); that as a matter of law DAB had "exclusive jurisdiction" over Petitioner's claims; consequently MSPB was required by law to dismiss all of Petitioner's claims. Employees are entitled to have a forum for their claims unless the applicable statutes clearly forbid MSPB, *e.g.*, from litigating the claims at issue. (*See Valentine-Johnson, supra*, at 812.)

Petitioner cited to the MSPB's holding in her litigation in federal court, and specifically petitioned the 6th Circuit to acknowledge the legal effect of the MSPB's ruling as definitive of her VA employee status as "permanent" with routine entitlements including DAB hearing rights. (*See* Pro se Plaintiff-Appellant's Dual Motion to Extend Time and Motion to Clarify, Dec. 23, 2009, p. 5, 15-17.)

The effects of the MSPB's ruling are, (1) Petitioner-Appellant was "permanent" because only a permanent VA employee could have the DAB procedure rights that VA successfully argued to the MSPB—and the MSPB ruled—she could avail herself of at the VA, (2) the MSPB's ruling that determined Petitioner is a "VA permanent" is the *law of the case* including on a remand to the VA to properly litigate her claims (*University of Tennessee v. Elliott, supra*, 478 U.S. 788, 798 fn. 6, 799, 106 S. Ct. 3220, 3226, 92 L. Ed. 2d 635 (1986); *New Hampshire v. Maine, supra*,), and (3) the MSPB's ruling, beyond being the law of the case, is forever fixed upon Respondent-Appellee VA because the MSPB ruling resulted from Respondent-Appellee VA's successful arguments.

CONCLUSION

Judicial estoppel demands that VA be made to live with the legal effects of its badfaith but successful arguments to the MSPB. Because of VA's switching positions and badfaith arguments that deprived Petitioner of effective hearing rights, Courts should impose judicial estoppel on Respondent in the most severe manner possible. VA must be ordered to view and treat Petitioner as a former employee who was "permanent" when terminated by a hearing board that had no subject matter jurisdiction over her.

Respondent-Appellee VA should be ordered to treat Petitioner as "VA Permanent" for all purposes including acknowledging and providing to her full Disciplinary Appeals Board due process and hearing rights.

Respectfully submitted,

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